ANY REASONABLE CREATURE IN BEING[1]

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I

My subject is abortion and the law: the law in the books, and the law in action. It is abortion *de lege lata* and abortion *de lege ferenda* – the law today, as laid down, and what tomorrow may bring. In canvassing my subject, I shall be applying a gloss, or supplying a commentary, to the memorable Tracy Maund Lecture delivered just one decade ago, by Dr Kelvin Churches' "Out of the Shadows: 120 Years of Abortion in Melbourne; a Social, Medical and Legal History". This was and is an important scholarly contribution to the learning on this persistently interesting, and intermittently controversial subject.[2]

II

A study of the law relating to abortion will remind us of the well-known antiphony in the Interment Service in the Book of Common Prayer:

"In the midst of life we are in death."[3]

A contemporary graffito embroiders the same thought:

"Life is a terminal disease – sexually transmitted."

The beginning is to be found in the law relating to murder in Coke's *Institutes*.[4] Sir Edward Coke, brutal prosecutor of Sir Walter Raleigh and the Gunpowder Plot conspirators, became Chief Justice of the Common Pleas and later Chief Justice of the King's Bench in the first twenty years of the 17th Century. He found time to write scholarly works, and his *Institutes* are described as the first textbook on the modern common law. He wrote:

> "Murder is when a man of sound memory, and of the age of discretion, unlawfully kills within any County of the Realm any reasonable creature *in rerum natura* [today rendered *anglice* as "in being"] under the King's peace, with malice fore-thought, either expressed by the party, or implied

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[1] The 22nd Tracy Maund Memorial Lecture, presented at The Royal Women's Hospital on 27 May 1986.

[2] The *Age*, 24 April 1976.

[3] Book of Common Prayer [1928], Burial of the Dead, 332.

[4] Sir E. Coke, *The Third Part of the Institutes of the Laws of England*, written in 1628, but first published in 1641.

> by law, so as the party wounded, or hurt, die of the wound, or hurt, within a year and a day after the same."[5]

That description remains today in England and in Victoria the authoritative starting point for any examination of the law of homicide (for Coke's statement defines not only murder but also, if the expression "malice fore-thought . . ." is removed, the serious offence of manslaughter). There is not yet a complete statutory definition of murder or manslaughter in this State. What the *Crimes Act* 1958, the chief enactment in this division of the law, provides is how those convicted of those crimes may be punished.[6]

Only "any reasonable creature *in being*" may be the victim of murder or manslaughter, and attract the protection, such as it is, of the criminal law proscribing those heinous offences. Coke proceeds to explain what these terms mean. ". . . [M]an, woman, childe, subject born, or alien, persons outlawed, or otherwise attainted of treason, felony or praemunire, Christian, Jew, heathen, Turk, or other infidel, being under the King's peace" are all potential victims.[7] He goes on:

> "If a woman be quick with childe and by a poison or otherwise killeth it in her wombe; or if a man beat her whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder."[8]

If, however, the child is born alive after either of the events so described, and dies subsequently as a result, then Coke holds that to be murder.[9] He then writes, "So horrible an offence should not go unpunished."[10] That seems to be a reference to the abortions to which he has referred. Why did the common law state, in words used by a distinguished Victorian judge and jurist, Sir John Barry, that "legally a person is not in being until he or she is fully born in a living state"?[11] Coke gives no explanation, but he was undoubtedly passing on the well established view of his predecessors, in the years stretching back to the Norman Conquest, and beyond that. In the law of Rome an unborn child was regarded as part of the viscera of its mother.[12] In Jewish law, only after the greater part of the baby was extruded at birth, could it be the victim of homicide.[13] Theological and medical debates about the moment of life's beginning focussed firmly on quickening in the womb, a subject of persistent interest and, in Coke's century, of social conversation. In 1904 a writer described quickening as "foetal gymnastics in a some-

[5] Sir E. Coke, *The Third Part of the Institutes of the Laws of England* (New York, Garland Publications, 1979 reprint of the 1641 edition) p. 47.
[6] See sections 3 and 5 of the *Crimes Act* 1958 (Vic.). Since 1981, section 3A provides a statutory definition of what is conveniently called the felony-murder rule.
[7] Coke, (1979 reprint) op.cit. p. 50.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] *R.* v. *Hutty* [1953] V.R. 338, 339.
[12] See J. F. Stephen, *History of the Criminal Law* (London, Macmillan 1883) Vol. 1, p. 25.
[13] T. B. *Oholoth*, Chapter 7, Mishna 6. See Rosner F., *Studies in Torah Judaism: Modern Medicine and Jewish Law*, (New York, Yeshiva University, 1972) pp. 65–75.

what confined play-room, which can be witnessed at mid-term, both *in situ* and after expulsion."[14] Henry de Bracton, who wrote his great treatise on *The Laws and Customs of England* in the middle of the 13th Century, had said that the killing of the foetus after quickening was murder.[15] While Coke recognized that there was life before birth, his contrary view on who may be a victim of homicide has prevailed to this day.

An explanation for the clear line drawn by the common law between the killing of any reasonable creature in being and the killing of the unborn was given one hundred years ago by a magisterial writer on and codifier of the criminal law of England, Sir James Fitzjames Stephen:

> "The line must obviously be drawn either at the point where the foetus begins to live, or at a point at which it begins to have a life independent of its mother's life, or at a point when it has completely proceeded into the world from its mother's body. It is almost equally obvious that the last of these three periods is the one which is most convenient to choose. The practical importance of the distinction is that it draws the line between the offence of procuring abortion and the offences of murder and manslaughter ... The conduct, the intentions, and the motives which usually lead to the one offence are so different from those which lead to the other, the effects of the two crimes are also so dissimilar, that it is well to draw a line which makes it practically impossible to confound them. The line has in fact been drawn at this point by the law of England ..."[16]

III

Coke wrote that to kill the quickened foetus was "a great misprision".[17] Sir William Blackstone followed Coke, in his *Commentaries on the Law of England* published in 1768. Giving evidence before the English Capital Punishment Commission in 1866, Mr Justice Willes agreed that there was a common law offence of killing an unborn foetus, but added, "the law of misprision is antiquated".[18] By then, however, Parliament had resolved whatever uncertainty attended the judge-made and institutionally enunciated law. In 1803 the use of drugs or instruments "wilfully and maliciously" with the intention of procuring a miscarriage was made a felony.[19] If the woman the subject of that use was "then being quick with child", or if it was done "with intent to murder her", it was a capital crime. Even if she was "not ... quick with child, or it may not be proved that she was ...", it was a felony punishable with transportation for fourteen years, or one or more of a fine,

[14] Dr B. Atkinson "Life, Birth & Live-Birth" (1904) 20 L.Q.R. 134, 136.
[15] *Bracton on The Laws and Customs of England* Vol. 2 (Harvard, Belknap 1968). (Translated, with revisions and notes, by S. E. Thorne, George E. Woodbine. (ed.) p. 341.
[16] Stephen, *Hist. of the Criminal Law*, (London, Macmillan 1883) Vol. III p. 2.
[17] See Footnote 8, above.
[18] *British Parliamentary Papers*, 1866, 21, p. 274, quoted by D. Seaborne Davies in 'Child-Killing in English Law', (1937) 1 M.L.R. 203, 211.
[19] 43 Geo. III, C.58, s. 1, "Lord Ellenborough's Act".

imprisonment, the pillory, or a whipping.[20] *Lord Ellenborough's Act* made pre-quickening abortions felonies, for the first time. This Act suggests, by its language and its other provisions, that the legislative intention was to protect women from being forced to undergo abortions. By 1861, when the famous *Offences Against the Person Act* was passed, the emphasis had shifted.[21] Section 58 of that statute provided, and still provides, that no distinction be drawn between quick and non-quick, and in the case of non-self-induced abortions, it makes no difference whether the victim is pregnant or not. But in the prosecution of self-induced abortions the Crown must prove that the defendant was pregnant at the time. This enactment deals with abortion from the standpoint of protecting the foetus rather than the mother, and of doing so on moral grounds. While Coke's distinction between the unborn and those in being is maintained, some protection – lesser than that instantly afforded to the baby born alive – is accorded to the child in the womb, even from its mother.

The Victorian Parliament faithfully copied the English Act of 1861 in the first *Criminal Law and Practice Statute* of 1864, fixing the maximum punishment for the felony at fifteen years.[22] The Consolidations of 1890, 1915 and 1928 brought the Act of 1861 into the modern criminal law of Victoria.[23] Section 65 of the *Crimes Act* 1958, enacted as part of the last Consolidation, states the law for today. The only change, made in 1981, has been the substitution of the expression "indictable offence" for the ominous word "felony".[24] Section 65 states:

> "Whosoever being a woman with child with intent to procure her own miscarriage unlawfully administers to herself any poison or other noxious thing or unlawfully uses any instrument or other means, and whosoever with intent to procure the miscarriage of any woman whether she is or is not with child unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means with the like intent, shall be guilty of an indictable offence, and shall be liable to imprisonment for a term of not more than fifteen years."

IV

The statute is not the whole law on abortion. Nearly 150 years ago, the Criminal Law Commissioners, after stating the law on abortion as they viewed it, proposed that a statutory provision should be made for therapeutic abortions, by qualifying the prohibition as follows:

> "Provided that no act specified [i.e., using an instrument or administering an abortifacient] ... shall be punishable when such act is done in good

[20] 43 Geo. III, C.58, s. 2.
[21] 24 & 25 Vict. C. 100, s. 58.
[22] *Criminal Law and Practice Statute* 1864 (Vic.), s. 55.
[23] *Crimes Act* 1890 (Vic.) s. 55; *Crimes Act* 1915 (Vic.) s. 62; *Crimes Act* 1928 (Vic.) s. 62.
[24] By the *Crimes (Classification of Offences) Act* 1981 (Vic.) s. 11.

faith with the intention of saving the life of the mother whose miscarriage is intended to be procured."[25]

Their recommendation was ignored. Sir James Stephen[25a] encountered great resistance whenever he raised the issue in preparing successive versions of his famous Draft Criminal Code, which almost became the law of England in 1880. The final form of the proposed Code had no qualification or proviso in its section on abortion, though its provision on child destruction did.

In 1896, the Royal College of Physicians sought counsel's opinion to test, however inadequately, the profession's view that an abortion to preserve the pregnant woman was no crime. The opinion given was that "*bona fide* the law does not forbid the procurement of abortion during pregnancy, or the destruction of the child during labour, where such procurement or destruction is necessary to save the mother's life".[26]

In 1929, legislation to create the new crime of child destruction was at last enacted in England. That offence was designed to deal with lethal acts done in the process of birth, before complete extrusion but in circumstances where it seemed that the expression "to procure the miscarriage" was, however large its meaning, inapplicable. The *Infant Life Preservation Act* and the provisions of the earlier abortion legislation do overlap, and in an appropriate case either may be employed. In that Act the therapeutic proviso first proposed in 1846 was attached to the proscription. But when Victoria's copy of the Act of 1929 was made in 1949, the proviso was omitted.

The famous trial of one of London's leading obstetrical surgeons, Mr Alec Bourne, in July 1938, on a charge of unlawfully procuring the miscarriage of a 14-year old girl pregnant after a gang-rape by a number of soldiers, provided the first clear opportunity to consider therapeutic abortions in a forensic context. The patient was described as normal and healthy, and "in medical terms", said Dr Joan Malleson, who examined the girl, "there is nothing to be said". Her parents were distraught and determined that she should not have the baby, and a number of the doctors who had seen her were concerned about her mental health if the pregnancy went to term. Though Mr Bourne was prepared to court, indeed invite, prosecution, the operation was done discreetly at the family's insistence, but somehow came to the notice of the authorities.[27]

Mr Justice McNaghten, the presiding judge, relied on the proviso in the Act of 1929 to give meaning to the word "unlawfully" in the 1861 abortion provision. The Attorney-General, who led the prosecution, defence counsel and the trial judge all agreed "if the operation was done bona fide to save the life of the mother the defendant was entitled to an acquittal", thus

[25] *British Parliamentary Papers* (1846), 24, 42 (art. 16).

[25a] Supra. note 16.

[26] *Taylor's Principles and Practice of Medical Jurisprudence*, Vol. II, (8th ed. London, Churchill, 1928) p. 144. (edited by Sydney Smith and W.G.H. Cook).

[27] See Seaborne Davies, D., "The Law of Abortion and Necessity", (1938) 2 M.L.R. 126, and also Barry J. V., "The Law of Therapeutic Abortion", (1938) 3 *Proc. Medico-Legal Soc. of Vic.*, 211.

accepting the 1896 counsel's opinion.[28] In the judge's view, that qualification, as expressed in the 1929 proviso, was to be attached to the earlier legislation. But Mr Justice McNaghten proceeded to state that: "Life depends on health, and it may be that if health is gravely impaired death results."[29] He went on with words which became embedded in the books:

> "If the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck the jury are quite entitled to take the view that a doctor who, in these circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman."[30]

He underscored that statement by saying that not only was the doctor "entitled to perform the operation" in those circumstances ". . . it is also his duty to do so."[31]

In his charge Mr Justice NcNaghten also described the clear limits of lawfulness:

> "Some there may be for all I know, who hold the view that the fact that the woman desires the operation to be performed is a sufficient justification for it. That is not the law . . . On the other hand, no doubt there are people who, from what are said to be religious reasons, object to the operation being performed at all. That is not the law either."[32]

He expressed to the jury his resolution of the fundamental dilemma thus:

> "The law of this land has always held human life to be sacred, and the protection the law gives to human life it extends also to the unborn child in the womb. The unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother."[33]

The jury returned a verdict of "not guilty".

V

Bourne's case was an expression of the law, as he understood it, delivered by a single judge of the High Court of Justice. It affected medical practice in Great Britain. But it did not lead to the provision of abortions in what were regarded by many as very tragic cases. These included a 12-year old pregnant by her father, and several women pregnant through rape. Professor Glanville Williams, England's leading scholar in the field of criminal law, wrote recently of the twenty years following the *Bourne* case:

[28] See Seaborne Davies, D., supra, p. 128.
[29] *The King* v. *Bourne* [1938] 3 All E.R. 615, 617E.
[30] Id. 619B.
[31] Id. 620F.
[32] Id. 518G.
[33] Id. 620G.

"Although illegal abortions ran into thousands each year, convictions were comparatively few (less than a hundred a year), largely because women who had sought the help of an abortionist were unwilling to give him away, but partly also because the police themselves tended not to look upon abortion as a real crime. The only people who were effectively deterred by the law were the doctors, who alone could operate safely."[34]

The English *Abortion Act* 1967 substantially changed the law and supersedes *Bourne*. It is a compromise, since it does not remove abortions from the realm of the criminal law, leaving it wholly to the choices of pregnant women and the determinations of their doctors. What the Act[35] provides is that, except in emergencies, two doctors must examine a pregnant woman and form the opinion either that the continuance of the pregnancy would involve greater risk to her life or physical or mental health than would its termination, or that there is a substantial risk that the child she carries, if born, would be seriously handicapped either physically or mentally. Of course the women concerned must decide whether to have the operation. If the doctors form either of those opinions, the abortion may be carried out, but only in an approved hospital or clinic. In forming their opinions the doctors may take into account the woman's present and foreseeable future environment. Legislation modelled on England's was enacted in South Australia in 1969,[36] and in the Northern Territory in 1974.[37]

VI

The prosecution in the Supreme Court in Melbourne of Dr Charles Davidson, on five counts of abortion,[38] became the occasion for a landmark ruling by the late Menhennitt J.[39] His extensive examination of the earlier law led him to conclude the relevant question in a case of an abortion performed by a doctor was this: was the abortion necessary? Necessity has not always been clearly recognized and accepted as a general defence, or excuse, in the criminal law. In 1938, the late Sir John Barry, (then Mr J. V. Barry K.C.), had argued that it was the appropriate defence to be deployed in a case like Mr Bourne's, especially since a Victorian judge could not rely, then or later, on the statutory proviso introduced in England's child destruction statute.[40]

Menhennitt J. held that a person who performs an abortion does so lawfully if he or she honestly believes on reasonable grounds that what was done was

[34] G. Williams, *Textbook of Criminal Law* (2nd ed., London, Stevens, 1983), 296.
[35] *Abortion Act* 1967 (Eng.) s. 1.
[36] *Criminal Law Consolidation Act Amendment Act* 1969 (S.A.), s. 3, introducing s. 82A into the *Criminal Law Consolidation Act* 1935–69 (S.A.).
[37] *Criminal Law Consolidation Ordinance (No. 2)* 1973 (N.T.), s. 4, introducing s. 79A into the *Criminal Law Consolidation Act and Ordinance* 1876–1969 (N.T.). See, for a general review, J. Cook and M. Dickens, *Emerging Issues in Commonwealth Abortion Laws*, 1982 (Commonwealth Secretariat).
[38] Contrary to s. 65 of the *Crimes Act* 1958 (Vic.).
[39] See *R* v. *Davidson* [1969] V.R. 667.
[40] J. V. Barry, "The Law of Therapeutic Abortion", recorded in (1938) 3 *Proc. Medico-Legal Soc. of Vic.*, 211, 220–4 and 228–9.

necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail, and, in the circumstances, not out of proportion to the danger to be averted.[41] The prosecution must convince the jury beyond reasonable doubt that the defendant did not hold one or other of these beliefs on reasonable grounds. After listening to the judge, the jury acquitted Dr Davidson on all counts.

VII

The ruling of Menhennitt J. was given during a year when the Victoria Police was conducting a major blitz of doctors performing unlawful abortions in Melbourne. In that year there were 129 charges of abortion laid. In that year there were, as well, sustained allegations that police officers had "demanded or accepted sums of money for protecting or failing to prosecute . . . [certain people]", including a number of doctors, "in respect of illegal abortion practices".[42] In January 1970, the government established a Board of Inquiry to investigate those charges.[43] In consequence of the Report four members and former members of the police were prosecuted, and three convicted, of conspiracy to obstruct the course of public justice. A year later, Judge Southwell applied the ruling of Menhennitt J. at the trial of Dr John Heath, charged on eight counts of abortion. Dr Heath's defence was that he had acted lawfully in all the cases, six of whom were teenage single girls, and two married women separated from their husbands. Expert medical witnesses called by the defence all agreed that "refusing to terminate a single teenage girl's pregnancy of less than twelve weeks would expose her to serious risk of substantial injury to her physical and mental health".[44] They also formed the same opinion about the separated married women. Dr Heath was found not guilty of one charge. After seven hours' deliberation, however, the jury could not agree on a verdict on the remaining charges. In October 1972 Dr Heath was told that the Crown did not intend to proceed with the prosecution of the remaining charges. In 1973 there were three charges of abortion laid. Since that year there has been no record of any prosecutions.[45] The subject is still taught in the detective training program. The police will only respond to complaints, and though there is no official published policy, the facts speak loudly enough for themselves. Unlawful abortion is not regarded as a current, serious law enforcement problem.

[41] See *R* v. *Davidson* [1969] V.R. 667, 672.

[42] Report of the Board of Inquiry into Allegations of Corruption in the Police Force in Connection with Illegal Abortion Practices in the State of Victoria (1971). The Board was constituted by Mr William Kaye, Q.C., later Kaye J.

[43] By Order-in-Council dated 5th January, 1970, Vic. Govt. Gazette No. 2, 9 Jan., 1970.

[44] The *Age*, 19 February, 1972.

[45] Since this Lecture was presented, there has been a report of the institution of a prosecution against a Melbourne doctor on counts of procuring a miscarriage: see The *Age*, 3 June 1986. The prosecution was dismissed: see The *Age*, 3 and 5 June 1987.

VIII

In the years since the ruling of Menhennitt J. was given, it has been accorded consistent respect – referred to by lawyers and even legislators as the settled law of Victoria. Two years after *Davidson's* case, the late Judge Levine delivered a charge on similar lines in *The Queen* v. *Wald*,[46] in the New South Wales District Court, with similar results.

The *Davidson* ruling has not come under the scrutiny of an appellate court. It is, perhaps, unlikely that it will. A very heavy burden of proof is cast on the Crown by the ruling, and accordingly acquittals are much more likely to result than convictions, save in the case of "backyard operators" whose activities do not generally raise serious questions about the lawfulness of what was done. (Since 1978, however, the Crown may, after an acquittal, refer a point of law to the Full Court for determination.)[47] In 1972 the prosecution and conviction of Ismet Salika for murder in a case where the death was caused by the unlawful use of an instrument with intent to procure a miscarriage underscored vividly the differences between medical and backyard abortions, and reminded Victorians that unlawful abortion, a felony, brought the special abortion felony-murder rule in its train.[48]

Several years after *Davidson's* case was decided, the late Professor Peter Brett and I wrote that:

> "... we believe that when that ruling is subjected to appellate scrutiny it will withstand challenge, for the opinion is carefully crafted and neatly fits the solution of the specific problem at issue into the general body of settled criminal law principles. Perhaps the one matter on which it may be questioned is its apparent requirement of reasonable grounds for the accused's belief as an element separate from the honesty of that belief, rather than as a matter bearing on the question of honesty ...
>
> It affords protection to the properly qualified doctor who directs his mind to the relevant matters – the different risks to the mother which are involved – considers them honestly, and reaches a decision. There is no issue as to whether his decision was 'right' in the sense of being one which a majority, even a large majority of doctors would have made: the issue is solely whether it is honestly made on the basis of the relevant considerations. On the other hand, those who operate without possessing proper qualifications, or in unhygienic conditions, or using dangerous methods, are in serious danger of conviction, for they will find it hard to satisfy the requirement of proportion. Again, properly qualified doctors who operate for extravagant fees and under surreptitious conditions also risk conviction, for their way of operating raises strong doubts as to the honesty of their beliefs on the matter of necessity."[49]

[46] *The Queen* v. *Wald* (1971) 3 N.S.W.D.C.R. 25.

[47] Section 2 of the *Crimes (Amendment) Act* 1978 (Vic.) inserted s. 450A into the *Crimes Act* 1958 (Vic.).

[48] *R.* v. *Salika* [1973] V.R. 272. See note 6, supra.

[49] P. Brett & L. Waller, *Criminal Law, Text and Cases* (4th ed. Sydney, Butterworths 1978), p. 103-104.

The ruling of Menhennitt J. is in general terms. It makes no attempt to formulate specific criteria for deciding when to end a pregnancy. It does not stipulate that a doctor must obtain a second opinion, nor that the operation must be carried out in a public or in a private hospital. These are matters which may, in a particular prosecution, relate either to the honesty of the defendant's beliefs or to the assessment of the relative risk to the woman's life or health.

It is my view that the *Davidson* ruling – bearing its status in mind – accomplishes all that the *English Abortion Act* 1967 does. The explicit mandate in that legislation to consider the woman's future circumstances could hardly be properly excluded by a Victorian doctor considering the question of necessity. Again, a doctor working under the *Davidson* guidelines would surely have to consider the probable effects on the mother's health of giving birth to a seriously handicapped child, if that is likely. The English (and South Australian) legislation does not in its terms instruct the doctors to consider the question of handicap from the standpoint of the effect on the mother, but that is what they will have to do in actual practice; for if the mother does not feel she (and her existing family) will be affected she will not be seeking an abortion.

It has been argued that the law of England since 1967 provides, if honestly interpreted, "abortion on demand".[50] If that is so, then, in view of my comparison of the *Davidson* ruling with the provisions of the *Abortion Act* 1967, a similar argument may be put in Victoria. In his letter published in 1968 in the British Medical Journal, Mr C. B. Goodhart wrote that, in the case at least of early pregnancies – say in the first trimester – the Act permits an abortion if the pregnant woman wants one.[51] The Act, in providing for lawful termination if the risk to the mother's life through continuance of the pregnancy is greater than if the pregnancy were terminated, has by that specified a condition which is always satisfied where termination is performed early in a National Health Service hospital. In such situations, the statistical risk to the mother's life of an abortion will not be greater and may indeed be less than the normal risks of pregnancy. But the English Act has not been so interpreted. In a recent account[52] of a prospective controlled study in England, organized jointly by the Royal Colleges of General Practitioners and of Obstetricians and Gynaecologists, out of 7466 women who demanded an abortion, 3.1% were turned down by the general practitioner first seen, and a further 4.1% by the gynaecologist after they had been referred. Six women changed their minds. I do not know, however, how many of those denied were in the second, or even third, trimester. This year a consultant obstetrician and gynaecologist in England has written this:

[50] C. B. Goodhart, "Abortion Regulations" (1968) 2 *British Medical Journal* 298.
[51] See note 51, supra.
[52] P. Frank, "Sequelae of induced abortion" in *Abortion: Medical Progress and Social Implications* (1985), 67–82, cited by S. L. Barron, "Abortion Denied" (1986) 20(2) *IPPF Medical Bulletin* 3.

"Granted that gynaecologists differ in their attitude to abortion, the medical decision is not easy. In advising surgical treatment for any other condition, the doctor requires a knowledge of the pathology and natural history of the disease, the benefits and hazards of surgery and the value of alternative management. The somatic effects of abortion are well documented, but the other side of the coin – continuing with the pregnancy – is more difficult to study: unwanted pregnancy is not a disease and there is no prospect of a controlled trial of abortion. One factor which militates against abortion is late gestation. There is a wealth of evidence which shows that morbidity and mortality from abortion rise sharply after the twelfth week of gestation, and this makes the gynaecologist reluctant to advise operation in the second trimester because of the increased risk. Unfortunately, it is the young and socially disadvantaged who tend to seek help in the second trimester, and any cohort of women who are denied abortion will be a biased sample."[53]

In Victoria, in addition to those considerations, it must be remembered that in *Davidson's* case Menhennitt J. spelled out that the doctor must honestly believe, on reasonable grounds, that the abortion is necessary to preserve the woman from a serious danger to her life or her physical or mental health *(not being merely the normal dangers of pregnancy and childbirth)*. The emphasized parenthetic qualification is of great importance.

IX

"Yet law-abiding scholars write;
Law is neither wrong nor right,
Law is only crimes
Punished by places and by times . . ."[54]

So wrote Winston Hugh Auden, perceptive judge of his society. In Victoria as I have already suggested, abortion is not a crime punished by our place in our time. The Director of Public Prosecutions has not, as yet, formulated and published general guidelines on its prosecution. It is fair to conclude that abortion does not rank high on his list of important areas of the criminal law in respect of which such guidelines ought to be prepared. The law in action is quiescent.

In the years since *Davidson's* case was published, there has been, of course, sustained discussion and controversy about abortion in the community. The activities of both "pro-choice" and "pro-life" groups are well-known, and the Queen Victoria Hospital has had its own experiences of pressure group policies carried into action.

There has been political and legislative activity also, in both the federal and Victorian arenas. In 1973, a private member's Bill, the *Medical Practice*

[53] S. L. Barron, "Abortion Denied", (1986) 20(2) *IPPF Medical Bulletin* 3.
[54] W. H. Auden, *Law Like Love*, reprinted in *The Law as Literature* (Louis Blom-Cooper (ed.) (London, Bodley Head, 1961) p. xiv.

Clarification Bill, was introduced in the federal Parliament[55] with a view to changing the law in all federal territories to permit abortion on demand where the pregnancy was less than sixteen weeks old. The Bill engendered a fierce debate across party lines, and, like most private measures, foundered early.[56] It may be seen against the background of the decision of the U.S. Supreme Court, announced in January 1973, in which by a majority of seven to two that tribunal held that it was a woman's right, constitutionally grounded, to decide in the first six months of pregnancy whether she would or would not have her baby. That landmark decision, *Roe* v. *Wade*,[57] has been under persistent attack since then. Its eleventh anniversary was proclaimed "National Sanctity of Human Life Day" by the President of the United States, who stated that:

> "Since 1973 ... more than fifteen million unborn children have died in legalized abortions – a tragedy of stunning dimensions that stands in sad contrast to our belief that each life is sacred ..."[58]

In 1979 Mr Stephen Lusher MP proposed a motion in the federal Parliament to the effect that medical benefits be denied except for those abortions clearly designed to save the mother's life. The motion was subjected to an amendment, carried 62 to 52 in the House of Representatives, to uphold what was claimed as the status-quo: payment of medical benefits for legal abortions.[59]

The Victorian state election of 1982 became a focus for public debate on the subject, generated by the Right to Life Association. The Association claimed, after the election, that its efforts had resulted in the Minister of Health in the outgoing Thompson Liberal Government losing his seat.

Since 1982, perhaps the most significant local expression of legislative opinion has been in connexion with reformative mental health measures. Some of the debate on the *Guardianship and Administration Board Bill* 1985 (based on the Cocks Committee Report of 1982) focussed on a provision, in the original measure, dealing with authorization of abortions, sterilization operations and organ donation operations to be performed upon intellectually disabled persons. In the Legislative Assembly, Mr L. S. Lieberman MP said this:

> "... in respect of the question of abortion, a vexed question in our society; in no way does the Opposition want the amendment to provide for any form of abortion on demand by sanction of the guardian or the Board. That is just not on. It is hard enough for Parliament to deal with this issue and to reflect as well as it can community aspirations and requirements in this vexed area of abortion, and most people accept Parliament's judg-

[55] By Tony Lamb and David McKenzie, both Labor Members of the House of Representatives.
[56] The Bill was defeated at Second Reading, 98 votes to 23: Australia, *Parliamentary Debates*, House of Reps., 10 May, 1973, 1963.
[57] 410 U.S. 113 (1973).
[58] Ronald Reagan, President of the United States: Proclamation – National Sanctity of Human Life Day, 1984, *U.S. Code Congressional & Administrative News*, 98th Congress, 2nd Session 1984, p. A7.
[59] Australia, *Parliamentary Debates*, House of Reps., 22 March, 1979, 1061.

ment and wisdom in accepting the Menhennitt ruling as being the basis for protection. However, some of us find it very difficult indeed to accept even that, and that is a matter of record."[60]

Mr M. T. Williams MP spoke in the same vein:

"There is no way legislation should be used to provide abortion on demand by the back door. Undoubtedly, the issue of abortion is very contentious in society. For my part, I fully subscribe to the so-called Menhennitt declaration ...

I agree there are problems where a person is not able to consent to an abortion procedure and medical practitioners must rely upon information from people other than the patient upon the effect upon a patient's mental health which a pregnancy might inflict. However, the might and weight of the State should not be imposed on citizens when a substantial minority – it may well be the majority, but I suspect it is a substantial minority – of the population is opposed to a legislative measure providing that where a retarded female in the care of an institution becomes pregnant there is an automatic right for doctors to terminate the pregnancy.

Parliament and Victorians must abide by the Menhennitt declaration and, therefore, the Bill should be amended to authorize only those practices already covered by legislation or judicial decisions. The law should not be extended, as would be done by the provisions of the Bill, to pave the way for abortion on demand. That is totally abhorrent to a large section of the community and should not be tolerated."[61]

He then said this:

"I suspect that the Menhennitt ruling is being flouted every day of the week and that is a scandal. The Government has a responsibility to enforce Victorian law and it should investigate the numbers of abortions taking place in Melbourne clinics ..."[62]

As a result of discussions between the Opposition and the Government, the clause was substantially amended and all references to the specific operations deleted.

X

Is it safe and satisfactory to conclude that the law in Victoria is firmly settled along the lines regarded as so well established in that most recent debate in the Parliment? Remember that the only legislation is section 65 of the *Crimes Act* 1958, and the remarkably consistent respect accorded to the ruling of Menhennitt J. cannot wholly obscure its formal status in the hierarchy of judicial authority.

Even if that be so, there are some matters which should trouble doctors, lawyers, and hospital administrators. "To procure the miscarriage" was an expression accoucheurs obviously used and understood in the first part of

[60] Victoria, *Parliamentary Debates*, Legislative Assembly, Vol. 382, 16 April 1986, 1188.
[61] Victoria, *Parliamentary Debates*, Legislative Assembly, Vol. 382, 16 April 1986, 1193.
[62] Victoria, *Parliamentary Debates*, Legislative Assembly, Vol. 382, 16 April 1986, 1193–4.

the nineteenth century. Some long-used intra-uterine contraceptive devices, coils or loops, cause the destruction of the blastocyst or prevent its implantation. Is the insertion of an IUD, then, the administration of "any instrument or other means . . . with intent to procure the *miscarriage* of any woman", in the words used in the Acts of 1861 and of 1958?[63] Is the administration of the "morning-after" pill caught by the statute? If the answer is yes, then unless the terms of the *Abortion Act* 1967 are satisfied, in those jurisdictions where it operates, or where apposite the requirements of the ruling of Menhennitt J. are met, these activities are illegal. The authors of the leading English text book on criminal law state, in their latest edition published in 1983, that these devices and techniques "appear to offend against the law because they function after fertilization of the ovum".[64]

Professor Glanville Williams has recently considered that same question. He writes:

> "The only way to uphold the legality of present medical practice, to make IUDs contraceptives and not abortifacients, is to say that for legal purposes conception is not complete until implantation. An advisory group established by the British Council of Churches (in 1962) took this line. Moreover, it has been accepted by the Department of Health and Social Security, and the Attorney-General has decided that pills designed to inhibit implantation are not abortifacient and their use is not criminal. The legal argument is that the word 'miscarriage' in the abortion section means the miscarriage of an implanted blastocyst."[65]

Williams then continues:

> "The line of argument would uphold the legality of a universal medical practice, and therefore provide a partial solution to immediate problems . . ."[66]

But he goes on:

> "Even dating the prohibition of abortion from implantation does not establish the legality of the gel and prostaglandin preparations, now being developed, which expel the foetus at an early stage *after* implantation. There is an argument for interpreting the word 'miscarriage' to allow a little more leeway on this question. 'Miscarriage' may be interpreted to mean the miscarriage of a foetus when it has achieved a certain degree of recognizable human organization."[67]

In view of the Attorney-General's statement, a prosecution is presently unlikely in England, but it may happen elsewhere. A prosecutor will rely on the argument that "miscarriage" as used in 1861, or as interpreted in 1986, means the termination of a pregnancy, and that that pregnancy begins the moment when the process of fertilization begins, when sperm and ovum begin

[63] *Offences Against the Person Act* 1861 (U.K.), ss. 58 and 59; *Crimes Act* 1958 (Vic.), ss. 65 and 66.
[64] J. C. Smith and B. Hogan. *Criminal Law* (5th ed., London, Butterworth, 1983), p. 343.
[65] Williams, op.cit. pp. 294–5.
[66] Id. 295.
[67] Ibid.

their union. Today biochemical evidence may be available which will clearly establish that fertilization has occurred and that the embryo has, accordingly, been destroyed.[68]

Until recently it was assumed that the termination of a pregnancy always results in a dead foetus. When that does happen, in circumstances where the termination is lawful or unlawful, then the disposition of the foetus may be made on the basis that it is like any other human tissue which is taken from the woman who bore it. The Australian Law Reform Commission, in its *Report on Human Tissue Transplants*, recognized that there were special problems in the use of foetal tissue (and gametes) in transplantation and the like and prudently excluded these from the ambit of the recommendations it made.[69] The legislation based on its recommendations contains the same exclusion.[70] In its 1983 *Report on Ethics in Medical Research Involving the Human Foetus and Human Foetal Tissue*, the National Health and Medical Research Council concluded that the use of foetal material obtained after a therapeutic abortion or as a result of natural processes is permissible. The Report states:

> "The consent of the mother and, whenever practicable that of the father, should be obtained before research is undertaken."[71]

But there are instances where termination does not result in a dead foetus. There has been public and parliamentary reference to such a case in this state. In 1975, the Chief Resident in obstetrics at Boston City Hospital was found guilty of manslaughter as a consequence of performing what was apparently a lawful abortion. He performed a hysterotomy when the patient was twenty-two weeks pregnant. The Commonwealth led evidence that he deliberately kept the foetus in the womb for three minutes, thus "smothering" it before extracting it. Dr Edelin's conviction was quashed and a judgment of acquittal entered by the Supreme Judicial Court of Massachusetts, primarily on the issue of wanton and reckless conduct, an essential element in manslaughter.[72] What he was accused of doing would not be a criminal homicide in Australia or England, unless there was evidence that the foetus had been alive, however briefly, after complete extrusion. But it may have been the crime of child destruction. The expression "capable of being born alive", used in defining the victim in that offence, is accompanied by the presumption that a child is so capable after the twenty-eighth week of pregnancy.[73]

[68] I. J. Keown, " 'Miscarriage': A Medico-Legal Analysis" [1984] *Crim. L. Rev.* 604.

[69] Australian Law Reform Commission, Report No. 7, *Human Tissue Transplants*, 1977, 18-21.

[70] *Transplantation and Anatomy Ordinance* 1978 (A.C.T.), s. 6; *Transplantation and Anatomy Act* 1979, (Qld), s. 8; *Human Tissue Act* 1983 (N.S.W.), s. 6; *Human Tissue Transplant Act* 1979 (N.T.), s. 6; *Transplantation and Anatomy Act* 1983 (S.A.), s. 7; *Human Tissue Act* 1985 (Tas.), s. 5; *Human Tissue Act* 1982 (Vic.), s. 5; *Human Tissue and Transplant Act* 1982 (W.A.), s. 6.

[71] National Health and Medical Research Council, *Report on Ethics in Medical Research Involving the Human Fetus and Human Fetal Tissue*, (1983), 18. (This requirement is now found in Supplementary Note 5 to the NH&MRC *Statement on Human Experimentation*.)

[72] *Commonwealth* v. *Kenneth Edelin* 359 N.E.2d 4 (1977).

[73] *Infant Life (Preservation) Act* 1929, (19 and 20 Geo. V., c.34) s. 1(2); *Crimes Act* 1949 (Vic.), s. 5(2), and now s. 10(2) of the *Crimes Act* 1958 (Vic.).

But that presumption is merely an evidentiary measure which reflected the knowledge and experience of premature births in 1929, when the first child destruction legislation was enacted. If there is expert evidence that a foetus which had not reached the age of twenty-eight weeks could nonetheless be born alive, then the statutory requirement is satisfied. Evidence of live births at the twenty-week stage would be significant.

If an abortion results in a live foetus in the dish, then it may immediately be the victim of murder or manslaughter, and what was done to it before extrusion may give rise to the most serious criminal responsibility for homicide. It is of no consequence that its life may end naturally in moments. Professor Williams has stated "[t]o avoid possible prosecution he (the doctor) should make sure that the foetus is destroyed in the womb".[74] If the foetus has reached that stage of maturity which is generally accepted today as the limit of viability – having reached a gestational age of twenty weeks and 400 grams in weight – then it may be argued that there is a clear duty on the doctors and nurses to use intensive measures to keep it alive. The consequences of actions designed to cause death to the extruded or extracted living baby, or even of failure to take measures, may be the institution of criminal proceedings. The trial of Dr Leonard Arthur in England in 1981 is a potent reminder of what may happen in the exercise of the discretion to prosecute.[75] Dr Arthur's acquittal of attempted murder by the jury, following a careful and sympathetic charge by Farquharson J., engenders a range of questions about the legal limits of live-saving and preservation in both very premature and defective neonates. In the same year that Dr Arthur was prosecuted and acquitted, the English Court of Appeal decided that a baby suffering from Down's Syndrome and an intestinal blockage, whose parents had decided it should be left untouched by surgery, be made a ward of court. The Court then authorized the surgery on its ward.[76] After the operation the local authority, which had instituted the proceedings, placed the baby with foster parents.

Related to these questions is another which has not been tested by prosecution in England or in Australia. Suppose there are clear grounds for a therapeutic abortion, to preserve the life or the health of the mother. Suppose that the abortion may be safely postponed until the pregnancy has proceeded for six months, until well after mid-term. Does the ruling of Menhennitt J., couched as it is in terms of the general defence of necessity, with its elements of choice of evils and proportion, permit the use of a method which will result in a dead foetus rather than a live baby? This matter has been examined and vigorously debated in North America. There is a succinct account of the main arguments by Mr Philip Bates, which he concludes with a depressing sentence:

> "This is a hazardous and confusing legal area in which clarification of the law is desirable; but any attempt to reform these laws will be controver-

[74] Williams, op.cit. p. 304.
[75] An account of the trial is given in *The Times*, 6 November, 1981, 1-2.
[76] *Re B* [1981] 1 W.L.R. 1421.

sial in view of the conflict and tension between committed supporters of foetal life and maternal self-determination."[77]

In view of the whole thrust of the ruling in *Davdison's* case, the more likely answer in the context of any local prosecution would be that if it was unnecessary to kill the foetus to effect the termination then it would be unlawful to do so.

XI

These are all uncertainties under the present law of abortion and the present law of homicide. They deserve resolution. In my view, the law of abortion, cast in the language of the nineteenth century enactment as qualified by the ruling of Menhennitt J., is not a safe and a satisfactory provision. Victorian lawyers may remember the resuscitation in this state in 1959 of the dormant crime of misprision of felony,[78] which Willes J. had seemingly thought was antiquated and obsolete in 1866,[79] and which the English Court of Criminal Appeal in 1948 said had fallen into desuetude.[80] Misprision of felony, defined baldly as concealing knowledge or information about a felony, then enjoyed a flourishing revival here and in England. In the course of it Lord Goddard L.C.J. expressed the view that a parent is under a duty to disclose felonious conduct perpetrated by a child, and vice versa.[81] Misprision of felony was put down, as a result of a sensible policy recommendation, by legislation enacted in England in 1967[82] and in Victoria in 1981.[83] It was a crime devised and developed as part of the common law, preserved in the institutional writings and the judgments of the courts. We have section 65 of the *Crimes Act* 1958.

So I advocate the consideration of the question by the Parliament, with a view to the enactment of a modern provision that will, at the very least, spell out plainly the important qualification moulded by Menhennitt J. Whether it does, perhaps, more, must necessarily remain uncertain. It will also employ language which represents the obstetrical knowledge and medical understandings of our time.

I know that this proposal is unattractive to some, who advocate a policy of letting sleeping legislators lie. No less a lawyer and would-be politician than the late Sir John Barry said this in 1938, in his concluding remarks to his paper "The Law of Therapeutic Abortion", which focussed on the *Bourne* case:

[77] P. Bates, "Foetal & Neonatal Life, Death and the Law" (1984) 9 *L.S.B.* 40, 41.
[78] In *R.* v. *Crimmins* [1959] V.R. 270.
[79] See note 18, supra.
[80] *R.* v. *Aberg* [1948] 2 K.B. 173.
[81] *Sykes* v. *D.P.P.* [1962] A.C. 528, 569. Lord Denning, in the course of a discussion of those relationships which would justify non-disclosure, expressed a similar view. He said (at p. 564), "... close family or personal ties will not suffice where the offence is of so serious a character that it ought to be reported."
[82] *Criminal Law Amendment Act* 1967 (Eng.), s. 1.
[83] *Crimes (Classification of Offences) Act* 1981 (Vic.), s. 2.

> "... I lean towards a definition of the law so far as it is possible, but I feel that on a subject such as this the reaction of the average person to it is not intellectual but emotional, and that in those circumstances, it is not a fit subject for the debate in popular assemblies or in the Parliaments that we have, having regard to the extent to which, unfortunately, the quality of the parliamentary representatives has deteriorated. I think it was Sir Richard Bethell, later Lord Westbury, who pushed divorce legislation through the English Parliament despite bitter opposition, but I am afraid that unfortunately we have no public men of his calibre at the moment."[84]

And the present Governor-General, Sir Ninian Stephen, said in 1981 that:

> "It is not unknown for governments in Australia to avoid, and if possible indefinitely to defer, definitive action upon what they regard as divisive issues, whether they concern abortion, prostitution, conservation, or any one of a score of electorally sensitive topics."[85]

Nonetheless, *autres temps, autres moeurs, autres lois.* In this decade public opinion as polled on abortion, whilst still certainly affected by emotion, has expressed itself thus. Those asked in 1980 were strongly in favour of legislation to make abortion lawful in cases not only clearly within the ruling of Menhennitt J., but also where a girl or a woman is pregnant from rape or from incest.[86] In 1982 those asked were in favour of permitting abortions in all cases where it was sought by a woman who first had had medical and social counselling.[87]

In his 1981 Southey Lecture, from which I have already taken one sentence, Sir Ninian Stephen also said this:

> "The passage of a measure through the legislature confers a unique stamp of democratic legitimacy, valuable in a country possessing democratic traditions. Moreover the legislative process is exposed to, and provides a safety valve for, those community pressures which, if not released in this way, may otherwise build up to levels dangerous to the system itself. An elected legislature as the identified and visible maker of laws can be seen to be responsive to legitimate pressures and to the strongly held views of the community."[88]

It is time for new statute law on this great matter, which can express the balance struck in our time, between the competing considerations, in a context which may never be completely stilled.

XII

Let me end with a sombre footnote. Coke's description, with which I began, posits any *reasonable* creature in being. What does the adjective mean? Black-

[84] J. V. Barry, "The Law of Therapeutic Abortion" (1938) *Medico-Legal Society Proceedings* 211, 246.
[85] Sir N. Stephen, The Southey Memorial Lecture 1981: "Judicial Independence – A Fragile Bastion" (1981-2) 13 M.U.L.R. 334, 346.
[86] The *Age*, 30 June, 1980, 5.
[87] The *Bulletin*, 18 May, 1982, 32.
[88] (1981-2) 13 M.U.L.R. 334, 342.

stone, following Lord Coke, wrote in his *Commentaries*, that a monster "which hath not the shape of mankinde", though born of a woman, was outside the pale of the law's protection.[89] He demurred from giving a straightforward explanation of the origins of such unreasonable creatures, but he hinted that they resulted from congress with animals. He was careful to note that a deformity did not denote monstrosity.

Archbold, the leading English practitioners' textbook, has this in its latest edition, published in 1985:

> " 'Reasonable', it is submitted, relates to the appearance rather than the mental capacity of the victim, and is apt to exclude monstrous births."[90]

There is no commentary on what are "monstrous births". Would a baby looking like the "Elephant Man" be counted as one? Traditionally, "reasonable" has meant "human" – no more and no less. Coke used it in its older sense of "having faculty of reason", that is, that quality which distinguishes human beings in general from other living beings in general. It has never carried the implication that severely defective, seriously deformed or physically or mentally deficient babies may not be victims of criminal homicides. But in a community where that is a matter on the agenda of a great national body established to deal with human rights, who is and who is not a reasonable creature in being is a grave question of law.[91] It should not be left without an authoritative answer.

[89] *Blackstone's Commentaries* (1776), II. 246.

[90] *Archbold's Pleading, Evidence and Practice in Criminal Cases*, (42nd ed., 1985), (S. Mitchell and P. J. Richardson (eds.), J. H. Buzzard (consultant ed.)), 1608.

[91] Human Rights Commission, "Legal and Ethical Aspects of the Management of Newborns with Severe Disabilities", Occasional Paper No. 10, August 1985.

And see also s. 6(2)(b) of the *Infertility (Medical Procedures) Act* 1984 (Vic.), which provides that a "prohibited procedure" means "a procedure under which the gametes of a man or a woman are fertilized by the gametes of an animal".